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No. 02-1735

In the Supreme Court of the United States

CALIFORNIA TROUT, INC., PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION AND SOUTHERN CALIFORNIA EDISON COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether the state water-quality certification provision of the Clean Water Act, 33 U.S.C. 1341(a)(1), applies to one-year licenses that the Federal Energy Regulatory Commission is required, under 16 U.S.C. 808(a)(1), to issue during the pendency of its proceedings concerning the re-licensing or recapture of licensed hydroelectric projects.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 313 F.3d 1131. The order of the Federal Energy Regulatory Commission (Pet. App. 16a-32a) is reported at 94 F.E.R.C. ¶ 61,326.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 2002. A petition for rehearing was denied on February 28, 2003 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on May 27, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, confers on the Federal Energy Regulatory Commission (FERC or the Commission) jurisdiction to license hydroelectric power projects. Under 16 U.S.C. 799, FERC may issue hydroelectric licenses for up to 50 years. When a hydroelectric license is due to expire, FERC may issue a new license to the existing licensee or a different licensee, "upon such terms and conditions as may be authorized or required under the then existing laws and regulations." 16 U.S.C. 808(a)(1). Alternatively, the federal government may take over the project and its operations, see 16 U.S.C. 807, or project operations may be terminated.

Section 808(a)(1) of Title 16 addresses the possibility that an existing federal license might expire before the Commission makes its decision about the project's future operations. In that event, "the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued." 16 U.S.C. 808(a)(1); see 18 C.F.R. 16.18(b) (stating circumstances in which FERC will issue annual license). The licensee must operate the hydroelectric project under the extended license until FERC determines the proper disposition of the project. Pet. App. 13a n.9.

2. The Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, gives the States a role in federal licensing of hydroelectric projects. Specifically, 33 U.S.C. 1341(a)(1) provides that:

> Any applicant for a Federal license or permit to conduct any activity * * * which may result in any discharge into the navigable waters, shall provide

> the licensing or permitting agency a certification from the State in which the discharge originates * * * that any such discharge will comply with [specified provisions] of this title. No license or permit shall be granted until the certification required by this section has been obtained or has been waived.

In accordance with Section 1341(a)(1), FERC regulations require applicants for hydroelectric licenses to obtain state water-quality certifications, or to demonstrate that certification is not required. See 18 C.F.R. 4.38(f)(7)(i), 16.8(f)(7)(i). But because 16 U.S.C. 808(a)(1) *requires* FERC to issue annual licenses "to the then licensee under the terms and conditions of the existing license," FERC does not subject annual licenses issued under that provision to any conditions beyond those contained in the original license. See 18 C.F.R. 16.18(b); see also Pet. App. 29a-30a (discussing 18 C.F.R. 16.18(d)).

3. In 1946, FERC's predecessor (the Federal Power Commission) issued a 50-year license to respondent Southern California Edison Company (Edison) for its Project No. 1933, on the Santa Ana River in California. The project diverts water from the Santa Ana River for both power generation and water distribution in the San Bernardino Valley. Pet. App. 2a-3a, 17a.

In 1994, Edison applied to FERC for the issuance of a new license, to be effective upon the termination of its 50-year license in 1996. Edison requested a water-quality certification from the California State Water Resources Control Board (California Board) in connection with its application for a new federal license. In 1995, the California Board denied Edison's certification request because the request did not provide sufficient

information. The California Board held Edison's administrative appeal in abeyance until March 2002. Edison later filed a new certification application. Pet. App. 3a.

4. In May 1996, when Edison's 50-year license was due to expire, FERC issued Edison, under 16 U.S.C. 808(a)(1), an annual license for the period May 1996 through April 1997. Thereafter, while re-licensing proceedings continued before FERC, the annual license issued to Edison renewed automatically, without further applications by Edison or action by FERC, in accordance with 18 C.F.R. 16.18(c). See Pet. App. 3a-4a.

In May 2000, petitioner requested rehearing of the Commission's automatic one-year extension of Edison's license from May 2000 through April 2001. Petitioner contended that FERC should not have issued an annual license without first requiring Edison to obtain a state water-quality certification for the annual license. Petitioner sought an order vacating the annual license and directing Edison to cease operations until it acquired a certification from the California Board. Pet. App. 4a.

In June 2000, the Commission's Secretary issued a notice rejecting petitioner's rehearing request on procedural grounds. Petitioner sought rehearing of the Secretary's notice. Pet. App. 18a-20a. Treating petitioner's second rehearing request as a petition to the Commission, the Commission denied the requested relief of vacating Edison's annual license. *Id.* at 16a-32a.

FERC explained that its issuance of the annual licenses during the pendency of Edison's license-renewal proceeding was "a ministerial and non-discretionary act, compelled by [16 U.S.C. 808(a)(1)]." Pet. App. 23a. FERC emphasized that Section 808(a)(1) not only commands the Commission to issue annual li-

censes, but also requires the existing licensee to continue operations under the terms and conditions of the original license, pending the Commission's decision on the project's future operations. *Id.* at 24a & n.20.

Against that background, FERC rejected petitioner's argument that the state-certification requirement of 33 U.S.C. 1341(a)(1) applies to annual licenses. The CWA's certification requirement, FERC observed (Pet. App. 26a), applies only to "applicant[s] for a Federal license or permit," 33 U.S.C. 1341(a)(1). The Commission determined that the recipient of an annual license is not such an "applicant" within the meaning of the CWA provision, because "an existing licensee is statutorily entitled to an annual license, without the need to apply for one, and the Commission is statutorily required to issue it." Pet. App. 26a-27a. The Commission further concluded that "[f]or annual licensing, which is non-discretionary and requires no application, the certification requirement is never triggered, because the annual license simply provides that the original license continues in effect pending relicensing." *Id.* at 28a-29a.

As an alternative ground for denying petitioner relief, FERC determined that Edison's continued operation of Project No. 1933 after May 1996, without CWA certification, also was permissible under the Administrative Procedure Act, 5 U.S.C. 558(c), which provides that if a licensee has made a timely and sufficient application for a license renewal, the license "does not expire until the application has been finally determined by the agency." Pet. App. 30a.

5. In December 2002, the Court of Appeals for the Ninth Circuit denied petitioner's petition for review of the Commission's decision. Pet. App. 1a-13a. In relevant part, the court of appeals determined (*id.* at 10a-

11a) that FERC's understanding of 16 U.S.C. 808(a)(1)—that it requires a ministerial and nondiscretionary act by FERC in issuing an annual license in accordance with the terms of the original license—is consistent with decisions of the District of Columbia Circuit and the provisions of the FPA. Indeed, the court explained, FERC lacked authority to include state-certification conditions in Edison's annual licenses, because Edison's original license did not authorize such conditions. Pet. App. 10a-11a. The court noted that petitioner's argument for revocation of Edison's operating authority "flies in the face not only of the statutory language but also the legislative purpose undergirding [Section 808(a)(1)]," which is to prevent the interruption of hydroelectric operations while FERC considers whether, and how, previously licensed projects should be operated in the future. *Id.* at 11a & n.8 (quoting *Lac Courte Oreilles Band* v. *FPC*, 510 F.2d 198, 205-206 (D.C. Cir. 1975), and citing legislative history). The court of appeals also observed (*id.* at 5a, 10a) that FERC's interpretation of Section 808(a)(1) is entitled to judicial deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 842-843 (1984).

The Ninth Circuit rejected petitioner's argument that Section 808(a)(1) should be "harmonized" with the CWA by barring the issuance of annual licenses until the relevant State either grants or waives a water-quality certification. See Pet. App. 12a-13a. The court explained that petitioner's approach is disfavored because it would "amount to a partial repeal by implication" of Section 808(a)(1)'s annual-licensing obligation. *Id.* at 12a. Furthermore, the court explained, the FPA's annual-license provision applies to this case more specifically than Section 1341(a)(1), and that

greater specificity also makes it inappropriate to construe Section 1341(a)(1) as a partial nullification of the annual-license requirement. *Ibid.* The court of appeals was unable to find any indication that "in enacting [the] CWA, Congress intended to restrict the authority of the Commission to prevent a shut down of a licensed project pending relicensing." *Ibid.*

The court of appeals therefore determined that, as used in Section 1341(a)(1), the term "applicant" does not include the recipient of an annual license under Section 808(a)(1). Pet. App. 12a-13a. The court added that its construction of the CWA allows the CWA and Section 808(a)(1) to "function comfortably side by side because no new project license or license amendment can issue without compliance with the State certification requirement." *Id.* at 13a. The court noted that annual licensing of a project stops upon the completion of the underlying proceeding for re-licensing or federal recapture of the project, and stated that annual licenses "should issue so long as the Commission is proceeding in good faith" toward the ultimate disposition of the project. *Ibid.*[1]

6. In March 2003, the California Board certified Project No. 1933 under the CWA. Pet. 4. On July 8, 2003, FERC issued a new long-term license for the project. The new license is for 30 years and is conditioned on Edison's compliance with its obligations under the California Board's water-quality certification, among other license requirements. See *Southern Cal. Edison Co.*, 104 F.E.R.C. ¶ 62,011 (2003).

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[1] The Ninth Circuit therefore did not allow FERC to issue annual licenses indefinitely, as petitioner suggests (Pet. 9).

ARGUMENT

The issuance of a new long-term license for Project No. 1933 on July 8, 2003, raises a serious question of mootness in this case. Furthermore, the decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals, and the judgment is correct for an alternative reason as well. For all those reasons, review by this Court is not warranted.

1. The petition challenges the Federal Energy Regulatory Commission's issuance of annual licenses to Project No. 1933, in the absence of a water-quality certification from the California State Water Resources Control Board. See Pet. ii, 8. Project No. 1933 is now the subject of the 30-year license issued on July 8, 2003, which was issued pursuant to the California Board's water-quality certification in March 2003. Although it is possible that the Commission might reverse its July 8 license decision in a future rehearing proceeding or a court might overturn it, thus potentially reviving the annual license issue, petitioner's challenge to the annual licensing of Project No. 1933 presently has no prospective significance. The petition should be denied for that reason. Cf. *Sears, Roebuck & Co.* v. *Carpet Layers, Local Union No. 419*, 397 U.S. 655, 657 (1970) (per curiam) (issuance of final agency order moots dispute concerning preliminary injunction).

2. Petitioner's principal argument (Pet. 11-29) on the merits is that annual licenses issued under Section 808(a)(1)—which in essence mandates extensions of existing licenses—are "licenses," requiring State water-quality certification under the CWA, 33 U.S.C. 1341(a)(1). The court of appeals correctly upheld FERC's contrary determination.

a. The CWA's water-quality certification provision applies to the issuance of new hydroelectric licenses, including licenses issued to existing licensees, as well as certain license amendments. See Pet. App. 27a-28a. Edison accordingly was required to, and did, obtain state certification for the long-term license it sought for Project No. 1933 in this case.

By contrast, the court of appeals correctly concluded, in agreement with the Commission, that the CWA's certification requirement is *not* triggered when the Commission takes the "ministerial and nondiscretionary" step (Pet. App. 10a; see *id.* at 23a) of automatically issuing a one-year extension of an already existing license under Section 808(a)(1) during the pendency of a re-licensing proceeding or a proceeding for federal recapture of a project. Section 808(a)(1) mandates that FERC "*shall issue* from year to year an annual license to the then licensee" during the pendency of the re-licensing or recapture proceeding, whether or not the existing licensee wants to extend the license and continue project operations. 16 U.S.C. 808(a)(1) (emphasis added); see Pet. App. 13a n.9, 23a-24a. The annual license must be issued "under the terms and conditions of the existing license." 16 U.S.C. 808(a)(1). Section 808(a)(1) therefore serves to "preserv[e] the status quo at the expiration of a longterm license," Pet. App. 11a (quoting *Lac Courte Oreilles Band* v. *FPC*, 510 F.2d 198, 205 (D.C. Cir. 1975)), not to grant a new license sought by an applicant. Section 808(a)(1), in fact, states explicitly that annual licenses are provided only when FERC has *not* issued "a license to a new licensee, or * * * a new license to the existing licensee." 16 U.S.C. 808(a)(1).

Petitioner's view—that Section 808(a)(1) involves the issuance of licenses independently subject to the certifi-

cation requirement of the CWA—ignores the mandatory nature of FERC's annual-licensing obligation, and would undermine the intended operation of Section 808(a)(1). In this case, for example, it might have been necessary to suspend the hydroelectric and water-supply operations of Project No. 1933 while the California Board undertook its deliberations on a water-quality certification for the project. The court of appeals correctly pointed out that such a result would be contrary to Congress's purpose of preserving the operations of federally licensed projects, despite the expiration of the original license term, while FERC is engaged in resolving issues concerning long-term future operations. See Pet. App. 11a & n.8.[2]

b. Contrary to petitioner's contention (Pet. 10, 11, 16-17, 20-21), there is no inconsistency between the instant decision and *PUD No. 1* v. *Washington Department of Ecology*, 511 U.S. 700 (1994). In *PUD No. 1*, this Court observed generally that the CWA's state-certification requirement applies "to applications for licenses from FERC" as well as "all federal licenses and permits for activities which may result in a discharge into the Nation's navigable waters." *Id.* at 722. That case, however, involved the construction of a new hydroelectric facility and an application for a new FERC license. See *id.* at 708-709. There was no issue

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[2] Although petitioner observes (Pet. 23) that requests for state water-quality certification should be made in advance of the expiration of a FERC license, that does not eliminate the practical problem with petitioner's proposed application of the CWA. If a State denied certification or imposed water-quality conditions that were not consistent with the terms of the original FERC license, then the issuance of an annual license, pending resolution of the underlying licensing and/or recapture issues, would not be possible under petitioner's theory, and the project could not operate.

concerning mandatory license extensions under Section 808(a)(1) or any similar statutory scheme.

Petitioner further relies (Pet. 14, 26) on the general definition of the phrase "license or permit" that the Environmental Protection Agency (EPA) has adopted in its regulations implementing 33 U.S.C. 1341. Although EPA defines the phrase broadly to mean "any license or permit granted by an agency" for a covered activity, 40 C.F.R. 121.1(a), EPA's rules do not specifically address non-discretionary license extensions such as those FERC provides under Section 808(a)(1). Nothing in EPA's rules, moreover, is inconsistent with FERC's determination that under the circumstances of this case there is no "applicant" for purposes of Section 1341(a)(1). See p. 5, *supra*.[3]

c. The Ninth Circuit drew support for its holding from several decisions of the District of Columbia Circuit. See Pet. App. 10a-11a. Petitioner nevertheless contends (Pet. 8, 21) that the instant decision conflicts with other appellate decisions applying the CWA's certification requirement. As petitioner implicitly concedes (see Pet. 21), none of those decisions involved the application of the CWA to mandatory annual licenses

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[3] Petitioner asserts (Pet. 25-26) that the court of appeals incorrectly afforded *Chevron* deference to FERC's interpretation of the term "federal license" in Section 1341(a)(1). Petitioner is mistaken. The court expressly did *not* defer to FERC's interpretation of the CWA. Pet. App. 5a. Instead, the court deemed reasonable FERC's understanding of FERC-administered Section 808(a)(1), *id.* at 10a-11a; rejected on its own merits petitioner's claim that the FPA and the CWA cannot be read harmoniously, *id.* at 12a; and determined (in agreement with FERC) that the best reading of Section 1341(a) is that it does not apply to a party who receives an annual license automatically under Section 808(a)(1), *id.* at 12a-13a.

under Section 808(a)(1), or any analogous circumstance in which a temporary extension of an existing license, without modification of its terms, *had to be* awarded by the agency and accepted by the recipient.

For example, *United States* v. *Marathon Development Corporation*, 867 F.2d 96 (1st Cir. 1989), on which petitioner relies (Pet. 21), involved activities undertaken after the Corps of Engineers, in its discretion, issued a nationwide "general permit" that was expressly subject to state water-quality certifications. See 867 F.2d at 97-101. The First Circuit determined that, where the Corps had expressly required compliance with state certification rules, "people who seek to engage in activity under a general permit" were subject to the state-certification requirement for those activities, notwithstanding that they were not required to file a permit application with the Corps. *Id.* at 101. The First Circuit did not suggest that state certification is required before an agency may, during the pendency of a re-licensing proceeding, automatically extend the original license on an interim basis.

d. Finally, the court of appeals correctly rejected petitioner's argument (Pet. 17-18) that any conflict between the CWA's certification provision and the FPA's annual-license provision—which the court of appeals concluded does not exist at all—would have to be resolved by making certification a precondition for annual licenses, rather than excepting annual licenses from the certification requirement. See Pet. App. 12a. The court of appeals appropriately applied the canons that specific provisions govern general ones, and implied repeals are disfavored. *Ibid.* (citing *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1017 (1984) (implied repeals), and *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974) ("Where there is no clear intention

otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.")). Petitioner has not identified anything in the text of the CWA that suggests Congress intended, through that legislation, to alter FERC's duty under Section 808(a)(1) to preserve the status quo during hydroelectric licensing proceedings.

Petitioner attempts to connect a mention of "renewals of existing licenses" in the legislative history of the CWA, with the reference to "New licenses and renewals" in the heading of Section 808. Pet. 27-28; see 16 U.S.C. 808. But petitioner offers no reason whatsoever to suspect that, in using the term "renewal" in the legislative history of Section 1341, Congress contemplated a linkage between Section 1341 and Section 808(a)(1), the text of which does not use the term "renewal" to describe annual licenses.

3. Because the court of appeals rejected the petition for review on the basis that FERC permissibly issued Edison annual licenses under Section 808(a)(1), it was "unnecessary" for the court to address the Commission's further determination that Edison's continued operation of Project No. 1933, while its re-licensing application was pending, was independently authorized by the Administrative Procedure Act, 5 U.S.C. 558(c). Pet. App. 13a n.11; see p. 5, *supra*. Nevertheless, the existence of that alternative basis on which FERC's decision could be upheld by this Court is another reason why the issue presented in the petition is not suitable for further review. See generally *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994) ("A prevailing party need not cross-petition to defend a judgment on any ground properly raised below.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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